United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING

75-4205

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4205

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

—v.—

JACK LALANNE MANAGEMENT CORP.,

Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S PETITION FOR REHEARING

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RESPONDENT'S PETITION FOR REHEARING

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Jack LaLanne Management Corp., the respondent herein, presents this petition for rehearing in the above-entitled cause, pursuant to Rule 40 of the Federal Rules of Appellate Procedure, and in support thereof, respectfully shows the following:

Introduction

The decision herein was rendered by a panel consisting of Judges Mansfield, Smith and Van Graafeiland, on July 27, 1976, and was filed on said date with the Clerk of the Court. No notice of entry of judgment has as yet been received.

This petition is made with respect to reconsideration of only one issue—the legality of the discharge of Paulette Anderson on March 25, 1974. While, most respectfully, we do not agree with the Court's disposition of the other issues herein, we do not ask that those dispositions be reconsidered, for the purposes of this petition.

The Anderson Discharge

The Court's error here lies in its holding that the findings of other unfair labor practices directed against Anderson and others, and the employer's stated animus towards Anderson, warrant the inference that a motivation for Anderson's discharge was her union activity and testimony, notwithstanding the existence of the valid cause for her discharge (i.e., her absolute refusal to accept a temporary transfer). (See the Court's reference, in its decision, to the discharge occurring "amid" warnings, and as being part of a "series of adverse employment decisions"—pages 5113 and 5114, respectively, of the Court's decision.) Respectfully, this is not the law.

An employer may desire to see an employee discharged because of his union activity, and take delight at the opportunity to discharge him. Nonetheless, if valid cause exists for the discharge, the employee cannot complain. If this be not true, an employer guilty of unfair labor practices would be deemed to have effectively waived his fundamental right to discharge or discipline as the needs of the business demand. *Klate-Holt Co.,* 161 NLRB 1606, 1612; *N.L.R.B.* v. *Birmingham Publishing Co.,* 262 F.2d 2, 8-9 (C.A. 5, 1959). The Board must prove, with respect to the

particular discharge at issue, that the motivation, at least in part, was an unlawful one. Union activity alone, and animus with respect thereto on the employer's part, simply do not immunize an employee against discharge for cause. *N.L.R.B.* v. *Lowell Sun Publishing Company,* 320 F.2d 835, 841 (C.A. 1, 1963); *N.L.R.B.* v. *Shepherd Laundries Co.,* 440 F.2d 856, 859 (C.A. 5, 1971).

We assume, for the purposes of this argument, that the Company desired to rid itself of Anderson because of her union activities, and was therefore "pleased as punch" to see her fired on March 25, 1974, when she absolutely refused to accept a temporary transfer to the Madison spa. Nonetheless, as the Board recognized in its *Klate-Holt* decision, *supra*:

> "The mere fact that an employer may desire to terminate an employee because he engages in unwelcome concerted activities does not, of itself, establish the unlawfulness of a subsequent discharge. If an employee provides an employer with a sufficient cause for his dismissal by engaging in conduct for which he would have been terminated in any event, and the employer discharges him for that reason, the circumstances that the employer welcomed the opportunity to discharge does not make it discriminatory and therefore unlawful." 161 NLRB, at 1612.

Were an employee of a company caught stealing from the cash register, the first such incident in the ten year history of our assumed company, and thereupon promptly discharged, the company's proven desire to rid itself of that employee because of his prior union involvement, its delight at seeing him go, would not preclude it from then

legally discharging him for stealing (cf. *Nix* v. *N.L.R.B.*, 418 F.2d 1001, 1007-1008, C.A. 5, 1969). Of course, if it could be shown that other, non-union personnel, had been caught stealing and not been discharged, an inference of unlawful motivation might well be drawn. But, absent a clear showing of such disparate treatment, or otherwise (such as, for example, conflicting reasons given for the discharge, *Nix* v. *N.L.R.B., supra*), the discharge would have to be sustained.

Stealing, is, undoubtedly, a cause for discharge more common to general experience than a discharge for a refusal to transfer, which was the precipitating cause for Anderson's discharge. However, on this record, it cannot be gainsaid that Anderson's admitted absolute refusal to transfer temporarily to a spa was equally good cause for discharge.

There is no question here that a genuine, compelling need existed, at that time, to transfer an employee to the Madison spa (A. 581-582, A. 585). The Board's General Counsel conceded the point (see our quotation of his brief to the ALJ, at page 14 of principal brief herein). There is no question in this case that transfers between spas are a common, everyday occurrence in the Company's operations. ALJ Stevenson so found in the prior unfair labor practice case (see copy of that decision lodged with the Court, at pages 4-6 thereof), the Regional Director so found in the prior representation case (A. 118, A. 119), and in the instant case, the Company presented massive, unrefuted testimony that such transfers are a way of life in the Company's operations (see record citations and discussion in our principal brief herein at pages 3, 4, 9-10, 12-14). The testimony is uncontroverted that other spas were called before Doug-

laston in an attempt to temporarily fill the Madison vacancy (A. 585-586). Finally, this very Court, in sustaining the propriety of the broad order issued by the Board cited the "transferability" of employees from spa to spa.

In this context, it is clear that ample reason existed for Anderson's discharge. Unless the Board could pierce a hole in the company's reason for the discharge, that discharge could not be attacked as prompted by unlawful motivation, and no inference to that effect could be upheld. That is the reason that both the ALJ and the Board strained so heavily to demonstrate that Anderson was treated disparately from other employees. This Court reflected its own recognition of the importance of such a showing by its parenthetical notation that the transfer Anderson refused to accept had been "previously declined by other employees with even less seniority." * It follows, then, that all agree that, absent a showing of such disparity, the discharge of Anderson was totally valid.

Is there substantial evidence to support the finding of disparate treatment? We contend that there is no evidence at all of disparate treatment, much less substantial evidence thereof, so that, as a matter of law the finding of illegality in Anderson's discharge must be reversed.

Disparate, discriminatory treatment consists of treating like cases differently, *NLRB* v. *Frosty Morn Meats, Inc.*, 296 F.2d 617, 621 (C.A. 5, 1961), and that is precisely our point. The cases of Caron and Antone are significantly unlike the Anderson refusal to transfer and, therefore, do not, as a matter of law, furnish a valid basis for a comparison to Anderson.

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* The Court could only be referring to employees Caron and Antone.

According to the ALJ's findings (A. 28), Antone, who Katz called first, about the transfer, said she could not then transfer because of a babysitter problem, while Caron, who Katz called second, had a problem of some sort with her sister's car. These declinations were thus premised on particular problems each had with transferring to Madison at that time. On the other hand, Anderson's refusal was, admittedly, absolute (A. 264). Unlike the refusals of Caron and Antone, there was "no way" (A. 264), she admitted, that the Company could ever transfer her to Madison, despite the uncontroverted fact that such transfers occur all the time. Unlike Caron and Antone, Anderson was setting down her own fixed, absolute condition of employment. An employer need not make its determination as to the penalty therefor, or react with precise computer-like similarity with respect to its abortive attempts to fill a gap elsewhere in its operations. *N.L.R.B.* v. *T. A. McGahey, Sr.*, 233 F.2d 406 (C.A. 5, 1956). Moreover, it is pertinent to reiterate that there is no 8(a)(1) or 8(a)(3) finding with respect to the requirement that Anderson transfer. The issue here is over the penalty imposed for such refusal, and we must note that even a disproportionate penalty over Anderson's refusal does not, *per se,* constitute an unfair labor practice. *N.L.R.B.* v. *McGahey, supra; N.L.R.B.* v. *Kopman-Woracek Shoe Mfg. Co.*, 158 F.2d 103, 108 (C.A. 8, 1946); *C.G. Conn Ltd.* v. *N.L.R.B.*, 108 F.2d 390, 397 (C.A. 7, 1939).

Moreover, vis-a-vis Caron, just as strong and known a union adherent as Anderson (A. 166, A. 317), the Company's failure to discharge her actually supports our contention that the Company was not trying to rid itself of

union adherents, for then, Caron would surely have been discharged also (*N.L.R.B.* v. *Croscill Curtain Co.*, and *Durham Drapery Co.*, 297 F.2d 294, 298, C.A. 4, 1961). The Board did not agree with this argument but, significantly, it expressly stated that our failure to discharge Caron was not persuasive of an unlawful motive (A. 54). This Court, particularly in view of its usual deference to "Board expertise", is not warranted in predicating its decision as to Anderson on a comparison with Caron's treatment, given the Board's express disclaimer of any reliance thereon.

Returning to Rolinda Antone, the only other employee who declined the Madison transfer and was not discharged, the evidence fails to demonstrate a disparity, and in fact shows like treatment of Antone and Anderson. Thus, supervisor Katz, about three weeks before Antone declined the Madison transfer, had asked Antone to transfer to Lefrak, and Antone refused (A. 388). A week later supervisor Katz called her again, and was, in Antone's own words, "insistent" that she accept the transfer (A. 389), which Antone then accepted. This insistence by Katz is the same insistence Katz later directed at Anderson with reference to the Madison transfer. In this respect, therefore, Antone and Anderson were treated in a like manner. The only difference was that Anderson, in response to Katz's insistence, absolutely refused to transfer (A. 264), whereas Antone abided by her employer's direction.

The fact that, a week later, Antone declined a transfer to the Madison spa, and was not compelled to transfer under penalty of discharge, is of no significance, since Antone had been compelled to go to Lefrak the week before. Here, too, the Board, in its discussion of the treatment of Antone as

evidence of disparate treatment, did not rely upon the Company's failure to discharge Antone for not going to Madison. Rather, it relied upon Antone's testimony as to her transfer back from the Lefrak spa to the Douglaston spa to prove disparity (A. 389, A. 53). We state flatly, as we did in our principal brief (at page 17 thereof), that Antone's testimony in this respect is no evidence of disparate treatment, and that the Board's reliance on it was plain error. There is no evidence—repeat, no evidence—that Antone went back to Douglaston other than because Katz so required. (We again invite the Court to read Antone's testimony at A. 389, and our discussion at pages 15 and 17-18 of our principal brief.)

Finally, with respect to Caron and Antone, the Court notes that they were less senior than Anderson. But, the record is devoid of even an iota of evidence that the Company accords any significance to seniority in effectuating transfers, or in respect to any other term or condition of employment. We therefore respectfully suggest that the Court's reference to differences in seniority is irrelevant.

The foregoing exhausts the "evidence" of disparate treatment. Neither the ALJ, the Board, nor this Court, has pointed to any other such "evidence", and there is none. And, since the evidence alluded to does not show disparate treatment, there is, therefore, no valid basis for inserting an illegally discriminatory motive in the Company's reasons for discharging Anderson. The discharge must be upheld, accordingly, as lawful, despite the findings as to other unfair labor practices and anti-union animus.

There is one other aspect of the disparate treatment issue which we believe warrants comment. The record does

not contain evidence that other employees had ever been discharged because of a refusal to accept a transfer. We claim the absence of such evidence does not lessen the force of our argument that the discharge of Anderson was proper. Absence of such a discharge prior to the hearing does not prove an illegally discriminatory motivation. If anything, it supports the proposition that the transfer way of life had always been accepted, and that the Company had not before been called upon to endure a "no way" refusal to transfer. We submit it was General Counsel's burden to affirmatively prove disparate treatment, inclusive of the fact that others, in the past, had not been discharged for an absolute refusal to transfer. It was not our burden to show the contrary. The General Counsel, of course, made no such showing.

CONCLUSION

Under the circumstances present here, the illegality of the discharge of Anderson is sustainable only if substantial evidence supports the finding of disparate treatement in that discharge. There is no evidence at all of disparate treatment, much less substantial evidence thereof. General Counsel completely failed to meet his burden in that regard and so, the portion of the Board's order pertaining to the Anderson discharge should be denied enforcement.*

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* In the event this petition is granted, and the Board's order as to Anderson denied enforcement, we ask that the Court then modify the scope of its order in accordance with our prior arguments on this appeal.

Dated: August 9, 1976
New York, New York

Respectfully submitted,

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Of Counsel:

LAWRENCE M. MONAT

Certificate of Counsel

I, LAWRENCE M. MONAT, of counsel to Respondent Jack LaLanne Management Corp., do hereby certify that the foregoing petition for rehearing is presented in good faith and not for the purposes of delay.

Lawrence M. Monat
LAWRENCE M. MONAT

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

Jospeh Boselli , being duly sworn, deposes

and says, that on the 10th day of August 1976 , at 3:30 o'clock

P. M. he served the annexed Respondent's Petition for Rehearing in RE: National Labor Relations Board v. Jack LaLanne Management Corp. No. 75-4205

upon Elliott Moore, Deputy Associate General Counsel

Esq(s)., Attorney(s)

for Petitioner

by depositing 2 true copies

thereof in a Post Office Box regularly maintained by the Government of the United States and under the care of the Postmaster of the City of New York at Village Station, New York, N. Y. 10014, enclosed in a securely closed wrapper with the postage thereon prepaid, addressed to said attorney(s) at (his/their) office

National Labor Relations Board- 1717 Pennsylvania Ave. N.W.
Washington , D.C. 20570

that being the address designated in the last papers served herein by the said attorney.

Joseph Boselli

Sworn to before me this 10th

day of August 1976

John Alusick

JOHN ALUSICK
Notary Public, State of New York
No. 31-4602133
Qualified in New York County
Commission Expires March 30, 1978